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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE EASTERN COMPANY, THE EASTERN CO. PENSION PLAN FOR HOURLY-RATED EMPLOYEES OF THE PATTIN MANUFACTURING COMPANY DIVISION, AND BANK OF BOSTON, CONNECTICUT (FORMERLY THE COLONIAL BANK),

Petitioners,

v.

CARL RINARD, *et al.*, AND A CLASS OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

This case involves nothing more than an application, to a unique set of facts, of what petitioners themselves describe as the "settled contract-based legal doctrine" of "incorporation by reference." Petition at 14. The court below found that the parties to a collectively-bargained pension plan agreement, who had revised the agreement to eliminate a provision that would have allowed the employer to claim a reversion of surplus assets upon plan

termination, did not intend to incorporate by reference into that agreement a provision allowing reversion that was contained in a separate trust agreement to which the union was not a party. That interpretation of the contracting parties' intent implicates no important or recurring issue of federal law, and no issue of federal law on which the circuit courts of appeals have adopted conflicting positions. *Certiorari* should therefore be denied.

ARGUMENT

I.

The Employee Retirement Income Security Act of 1974 ("ERISA") prohibits the reversion of pension plan assets to an employer, even upon plan termination, except where "*the plan* provides for such a distribution." 29 U.S.C. § 1344(d)(1)(C) (emphasis added).

The plan involved in this case was set forth in an agreement between the petitioner Company and the Union that represented the respondent employees. The agreement was entitled "The Eastern Company Pension Plan for Hourly-Rated Employees of the Pattin Manufacturing Company Division" ("Pension Plan Agreement"). The Company and the Union expressly agreed that the Pension Plan Agreement constituted "the Plan." *See* Pension Plan Agreement, § 2.24 ("*Plan* shall mean the Pension Plan set forth herein and subsequent amendments hereto.") (Jt. App. 36); *id.* at p. 1 (in the Pension Plan Agreement, the Company and the Union "have amended and restated the retirement plan . . . on the terms and conditions hereinafter set forth") (Jt. App. 27).[1]

Prior to the enactment of ERISA, the Pension Plan Agreement contained a provision stating that upon termination of the Plan, "any funds not required to satisfy all liabilities of the Plan for pensions because of errone-

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[1] References to "Jt. App." are to the Joint Appendix filed in the Court of Appeals. The appendix to the Petition for Certiorari is cited as "Pet. App."

ous actuarial computations shall be returned to the Company." Pet. App. 13a. However, shortly after Congress enacted ERISA—with its prohibition of reversion except where "the plan [so] provides"—*the contracting parties eliminated that reversion provision from the Pension Plan Agreement.* As a consequence, the Pension Plan Agreement, as it stood at the time of plan termination in 1987, did not contain *any* provision allowing a reversion of assets to the Company upon plan termination. To the contrary, the only parties identified in the Plan as eligible for a distribution of assets upon plan termination were the *Members* and *Beneficiaries* of the Plan. Pension Plan Agreement, § 17.3 (Jt. App. 88).

The Company distributed Summary Plan Descriptions ("SPDs") to plan participants in accordance with section 102 of ERISA, 29 U.S.C. § 1022, which requires plan sponsors to provide SPDs "written in a manner calculated to be understood by the average plan participant and . . . sufficiently accurate and comprehensive to reasonably apprise such participants of their rights and obligations under the plans." On the subject of the distribution of assets upon plan termination, the SPDs stated:

> In the event the Plan discontinues, the assets of the Plan will be used to provide benefits to Members in the order of the priority categories specified in the Plan document. [Jt. App. 290]

The SPDs also stated that "[n]o part of the Fund can be diverted or used for any purpose *except for the exclusive benefit of Members except where a contribution was made by mistake or found not deductible on a Federal Income Tax return.*" Jt. App. 283 (emphasis added). Thus, neither in discussing plan termination nor in discussing the use of funds did the SPDs suggest that plan assets could revert to the Company upon plan termination. Nor was there any suggestion to that effect elsewhere in the SPDs.

When the Plan was terminated in 1987, the assets of the Plan exceeded what was necessary to provide the benefits defined in the Pension Plan Agrement.[2] The Company argued in the courts below that it had a right to the surplus assets, by virtue of a provision contained *not* in the Pension Plan Agreement or in any other agreement between the Company and the Union, but in a separate Trust Agreement between the Company and the Colonial Bank and Trust Company ("the Bank"), which served as Trustee to the Plan. The Trust Agreement was never the subject of negotiations between the Company and the Union, and the Union was not a party to that Agreement. *See* Pet. App. 5a n.1.

The Pension Plan Agreement—which the parties expressly agreed constituted "the Plan," *see* supra at 2—contained no language stating that the Trust Agreement, or any provision thereof, was to be deemed part of "the Plan." In fact, the Pension Plan Agreement contained only two general references to the Trust Agreement, and those references, as the Court of Appeals, held, constituted "little more than a recognition of the existence of a trust and a restatement of the duty of the employer to segregate plan assets." Pet. App. 8a.[3]

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[2] The Pension Plan Agreement defined certain benefits participants would receive upon retirement, and it provided that the Company would make contributions to a Trust Fund so as to fund the benefits. Pension Plan Agreement, § 10.1 (Jt. App. 58). In practice, the Company and the Union entered into a series of agreements that required the Company to make irrevocable contributions to the Trust Fund in specified amounts. *See* Jt. App. 264-269. For example, a 1975 agreement required contributions by the Company in the amount of ten cents per hour per employee.

[3] Section 18.1 of the Pension Plan Agreement recited that "[i]n order to implement the Plan, the Company has entered into an Agreement of Trust to the end that such funds as may be irrevocably contributed from time to time for the payment of all or any part of the benefits under the Plan shall be segregated from the Company's own assets and held in trust by the Trustee for the exclusive benefit of the Members or their Beneficiaries under the

On these facts, the Court of Appeals' conclusion that "the plan" did not provide for reversion, was both clearly correct and unremarkable.

II.

A. Petitioners acknowledge that their quarrel with the decision below centers on how the Court of Appeals applied, to the particular facts presented here, the "settled contract-based legal doctrine" of "incorporation by reference." Petition at 14. Petitioners argue that the court below erred by requiring greater "specificity" for incorporation by reference than a proper application of the common law test would require. *Id.* at 21-24. But the Court of Appeals did not purport to depart from the analysis that would apply under common law. *See* Pet. App. 8a n.3. And it is petitioners, not the court below, who misstate the common law: at common law the facts set forth above plainly would not support—much less compel—a finding that the reversion provision of the Trust Agreement was incorporated by reference into the Pension Plan Agreement.[4]

Plan who may, in accordance with the terms of the Plan and such Agreement of Trust, be entitled to participation thereunder." Jt. App. 90. Section 2.30, in turn, defined the term "Trust" to mean "the legal entity resulting from the Trust Agreement between the Company and the Trustee who receives the Company contributions, and holds, invests and disburses funds to or for the benefit of Members and their Beneficiaries." Jt. App. 38.

In addition to those two references to the Trust *Agreement*, the Pension Plan Agreement referred at several points to the existence of *a trust*. The district court placed great emphasis on these "many references to the trust in the Plan." Pet. App. 15a. But the mere mention of the fact that pension funds are held in trust certainly does not constitute an incorporation by reference of every provision that may be contained in a separate trust *agreement*. *See infra* at 5-7 & note 4.

[4] Petitioners suggest that at common law the mere mention of one document in another would suffice for incorporation by reference. *See* Petition at 21-23. As the Court of Appeals stated, that

Even if that point could fairly be questioned, this Court should not grant *certiorari* merely to review an application of "settled contract-based legal doctrine" to the particular facts of this case. Nor should the Court grant *certiorari* to expound on "[j]ust how much 'specificity' is possible or desirable before the doctrine of incorporation by reference is to be applied to key pension documents like a trust agreement." Petition at 14. As petitioners themselves acknowledge, this is not an area that lends itself to "any 'wooden' rule mechanically applied." *Id.* at 22.

While acknowledging that wooden rules should not be applied in these circumstances, petitioners suggest that because of "the importance of the trust arrangement" under ERISA, Petition at 21, all provisions of trust agreements should routinely be understood to be incorporated by reference into pension agreements. That is a *non sequitur*: the fact that ERISA requires generally that pension plan assets be held in trust and gives trustees an "important role," Petition at 19-21, does not suggest that every provision a company and a bank may choose to place in their trust agreement should be considered part of the governing pension plan—particularly where, as here, the plan, but not the trust agreement, is the product of collective bargaining and agreement between a company and a union. The cases petitioners cite on this point, *see id.* at 14, 19-21, stand for nothing more

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is not the common law. *See* Pet. App. 8a n.3. In this connection, petitioners' reliance on this Court's decision in *Guerini Stone Co. v. P.J. Carlin Constr. Co.*, 240 U.S. 264 (1916), is misplaced. In that case, the Court held that a general contract, although mentioned in a subcontract, was *not* incorporated by reference therein. *Id.* at 277-78. Petitioners misrepresent the holding of *Guerini Stone* by omitting the final words of the sentence quoted at p. 21 of the Petition. The complete sentence reads: "[I]n the case of subcontracts, as in other cases of express agreements in writing, a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement *only for the purpose specified.*" 240 U.S. at 277 (emphasis added).

than what the court below acknowledged, namely, that it is possible for a "plan" to consist of more than one document, *see* Pet. App. 6a n.2, and that provisions of a trust agreement may be incorporated by reference into a pension plan agreement *where the language of the documents, fairly construed, so provides. See* Pet. App. 8a & n.3.[5]

In this connection, the court below did not adopt any evidentiary "presumption" foreclosing proof in an individual case that the contracting parties intended to incorporate a trust agreement by reference into "the plan" for purposes of 29 U.S.C. § 1344(d)(1)(C). *See* Petition at 17. The court's reference to a "presumption" was no more than a recognition of the fact that ERISA generally prohibits reversion of assets to employers, subject only to certain specific exceptions, one of which is where "the plan [so] provides." *See* Pet. App. 7a. And, the court applied this "presumption" only to reach a result that would be compelled on the facts of this case under any reasonable standard, and one that the court expressly held would flow from common law principles wholly apart from any special requirements of ERISA. *See* Pet. App. 8a & n.3.

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[5] Petitioners consistently mischaracterize the cases they cite. *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984), was not, as petitioners assert, a case in which this Court "proceeded on the premise" or "assum[ed]" that trust agreements are incorporated by reference into pension plans. *See* Petition at 14, 19. Rather, the employers in *Robbins* had *conceded* that their particular collective bargaining agreements incorporated the trust agreements. *Robbins v. Prosser's Moving and Storage*, 109 LRRM 3229, 3231 (8th Cir. 1982) (*per curiam*), *aff'd*, 700 F.2d 433 (8th Cir. 1983) (*en banc*), *aff'd sub nom. Schneider Moving & Storage Co. v. Robbins, supra.* Nor was *Santa Monica Culinary Welfare Fund v. Miramar Hotel Corp.*, 902 F.2d 1491 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2855 (1991), a case "incorporating a trust agreement by reference" into a pension plan agreement. *See* Petition at 20. Rather, in *Miramar* the trust agreement was enforced directly against the defendant employer who was "bound by its terms." 920 F.2d at 1494.

B. The decision below does not conflict with any other court of appeals' decision on any issue of federal law. The Ninth Circuit decision relied on by petitioners, *Schuck v. Gilmore Steel Corp.*, 784 F.2d 947 (9th Cir. 1986), did not purport to "resolve[]" either of the legal issues identified by petitioners. *See* Petition at 16; *see also id.* at 13. To the contrary, the *Schuck* court purported to do nothing more than interpret particular language in a particular pension plan agreement. That language differed in significant respects from the contract language at issue here, *compare* 784 F.2d at 951 *with supra* at 2-4 & note 3, and the circumstances surrounding the negotiation of that language were significantly different as well; in particular, there was no evidence in *Schuck*, as here, that the contracting parties had eliminated a reversion provision contained in prior versions of the pension plan agreement.

The Ninth Circuit interpreted the contract language at issue in *Schuck* as clearly putting plan participants on notice that a separate trust agreement would control termination of the plan. *See* 784 F.2d at 951 ("Any participants who read the Pension Agreement would have known another document would control termination of the plan."). Although that characterization may be open to question, the *Schuck* court predicated that characterization solely on the court's reading of the relevant contract language, and not on any principle of federal law that differs from the principles applied by the court below. Accordingly, there is no "conflict" between the Ninth and Sixth Circuits on any issue of federal law.[6]

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[6] The court below indicated that *Schuck* might be read to suggest that a pension plan agreement incorporates a trust agreement by reference whenever the pension plan agreement merely acknowledges "the existence of a trust and . . . the duty of the employer to segregate plan assets." Pet. App. 8a. Again, the *Schuck* court did not purport to lay down any such rule of law; and if *Schuck* were interpreted in that manner, the decision would plainly be a sport. No court has cited *Schuck* as precedent for how the doctrine of

Nor is the decision below in conflict with the "several other ERISA decisions" relied on by petitioners. Petition at 23; *see also id.* at 15-16. *Outzen v. FDIC ex rel. State Examiner of Banks*, 948 F.2d 1184 (10th Cir. 1991), gave effect to a reversion provision in the Plan document itself; there was no issue presented in *Outzen* concerning the incorporation by reference of a separate trust agreement. Similarly, the issue presented in both *IUE v. Murata Erie North America, Inc.*, 980 F.2d 889 (3d Cir. 1992) and *In re Gulf Pension Litig.*, 764 F. Supp. 1149 (S.D. Tex. 1991), was whether the Plan document itself could be amended to provide for reversion.[7]

C. Finally, the decision below has no "public policy implications." *See* Petition at 14-16, 24-25.

The issue of whether a trust agreement provision authorizing reversion has been incorporated by reference into "the plan" for purposes of 29 U.S.C. § 1344(d)(1)(C) is not a recurring one. Nor should that be at all surprising: in light of the statutory language, any prudent employer would place a provision authorizing reversion in the Plan document itself or at least draft the Plan document to accomplish, under ordinary rules of contract interpretation, an incorporation by reference of another document containing such a reversion provision.[8] Because employers can readily draft their plan

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incorporation by reference should be applied in this or any other ERISA context.

[7] Petitioners simply misquote the decision in *IUE v. Murata* when they assert that the Third Circuit declared that "language purporting to prohibit reversion . . . must be quite explicit." Petition at 16. What the Third Circuit actually said was that "language purporting to prohibit *amendment to plan documents* to allow for reversion . . . must be quite explicit." 980 F.2d at 906 (emphasis added).

[8] Indeed, employers do not appear to have been experiencing great difficulty in providing for reversions under the terms of their

documents to secure an intended reversion right, the decision below creates no incentive for employers to be "less generous" in funding pension plans, *see* Petition at 15, for fear that they will not be able to claim a reversion.

CONCLUSION

For the reasons stated, the petition for *certiorari* should be denied.

Respectfully submitted,

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plans, as reflected by the large number of reversions that petitioners cite as having occurred from 1980-86. *See* Petition at 14 n.3.

Petitioners cite these reversion statistics to illustrate the "national economic significance" of plan terminations resulting in reversions. *See id.* at 14. But as used for this purpose, these reversion statistics are selective and misleading. Since 1986, Congress has sought to discourage employers from terminating pension plans in order to recover surplus assets by placing increasingly onerous excise taxes, as high as 50%, on any such assets recovered by the employer. *See* S. Bruce, *Pension Claims, Rights and Obligations* 659-61 (2d ed. 1993). These excise taxes, combined with changed economic conditions, have resulted in dramatically fewer reversions in recent years. In its 1992 Annual Report, the Pension Benefit Guaranty Corporation ("PBGC") reports that

> [p]lan terminations resulting in large reversions of surplus assets to employers fell to their lowest levels since PBGC first began recording such cases in 1980. For 1992, fewer than 10 plans were expected to terminate with reversions in excess of $1 million each, compared to fewer than 40 last year and the 582 plans that terminated in the peak year of 1985. Terminations in 1992 will have less than $20 million of total estimated reversions compared to reversions of about $70 million in 1991 and $6.1 billion in 1985. [1992 Annual Report at 5-6.]